United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2483

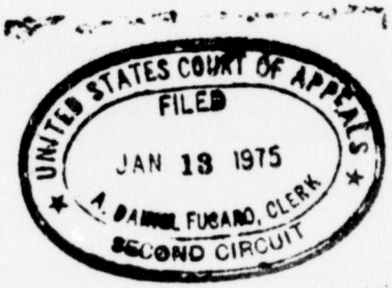
To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ALLEYNE F. ROBINSON, JOSE ANTONIO ACOSTA ALVEREZ, and JOSEPH M. VILLEGAS, Appellants.	Docket No. 74-2541 Docket No. 74-2492 Docket No. 74-2483

BRIEF FOR APPELLANT
JOSEPH M. VILLEGAS

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the activities charged in the indictment in this case are punishable under §501(c).

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Dudley Bonsal) rendered on November 7, 1974, convicting appellant of conspiracy and aiding and abetting in the embezzlement and conversion of union property in violation of 29 U.S.C. §501(c). Appellant was sentenced to a three-month term of probation and a $250 fine.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Appellant was indicted* with Alleyne Robinson and Jose Antonio for conspiracy to violate 29 U.S.C. §501(c) by knowingly embezzling, stealing, abstracting and converting for their own use monies, funds, securities, property or other assets. The union property that was involved was application forms for admission to Group I of Union Membership. The indictment also charged appellant with two substantive counts of violation of §501(c) and §402.

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* The indictment is B to appellants' joint appendix.

During the trial the Government showed that the National Maritime Union (N.M.U.) represented seamen who worked on private commercial vessels and Government vessels operated by the Military Sea Transport Service (MSTS)* (82-3**). A separate division of the union supervised matters for union members employed on Government vessels (83). The N.M.U. registered all seamen seeking jobs by Group 1, 2, 3, or 4. Applications were made at the hiring hall and a seaman could register in one of the groups for employment if he had merchant mariner documents issued by the Coast Guard upon payment of union dues or a service fee (85). Membership in Group 1 required 800 sailing days in the prior five years (93, 102).*** To move from Group 2 to Group 1 a member needed the requisite sailing time and was required to pay a $150 initiation fee and quarterly union dues (94). As jobs were assigned at the union hiring hall, Group 1 members were given priority over all other members for jobs.

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* The ships were run by the Corps of Engineers, Coast Guard, Geodetic Survey and the Bureau of Fisheries.

** Numerals are references to minutes of trial.

*** Group 2 members had worked on National Maritime Union ships or had requisite alternative training; Group 3 members had sailed, but not on a National Maritime Union contract-vessel; Group 4 members had no sailing time (92). If no Group 1 member was available at the hall to take the job, Group 2 members were called and so forth.

Application forms for Group 1 membership were obtained at any union office (112). The forms required a list of hours worked during the prior five years on commercial or MSTS services (96) and were filed with a $150 initiation fee plus any other dues owed the union.

Time aboard commercial vessels was [illegible] in documents called "discharges." These discharges were given to seamen by a Coast Guard shipping commissioner at the conclusion of a voyage (96) and a copy was attached to a white colored Group 1 application (102). The accuracy of the time recorded on the application form was verified against both the discharges and the records of the union pension and welfare office (103, 140, 143-5).

Those employed on MSTS vessels had to list sailing time on the military vessels; their Group 1 applications were green colored (102). The union could not check military time from its own records (103, 140), but had to send the forms for corroboration to the Government Office which had the records (120, 125).

It was the responsibility of union patrolmen to complete or supervise the preparation of the forms (125). The union patrolmen also took the green (MSTS) forms to the Government Office for checking (125).

After the hours were verified (141), the seamen received a union book and a green identification plate made up by the record room (94, 97, 100-1, 140, 146). The seamen could pick up the book at the patrolman dispatcher's office (128, 142, 146).

In 1969, Robinson was a union patrolman, part of whose responsibilities were to receive Group 1 applications (122) from seamen on MSTS vessels (125) and accept the $150 initiation fee and supply the receipt (140). Appellant Villegas was also a patrolman (132), but had not MSTS duties (133).

The scheme alleged by the Government was that the three defendants conspired to falsify the MSTS hours to obtain for seamen Group 1 books when the seamen did not in fact, have the requisite hours to obtain the books.

Two Government witnesses testified against appellant Villegas. Israel Capote said that at the end of May, 1969, he met Villegas at the union building (170). He had come from his home port of Seattle to find out about the books (224-5). Villegas asked Capote if he wanted to be in Group 1 and told Capote to return that afternoon at one o'clock. When Capote returned at the appointed hour, Villegas told him to get copies of his discharges and return

the next day (171). At the next meeting, appellant stated it would cost $750 to get the book (172). Capote again returned and together with Villegas went to Robinson's office (173). In front of Robinson, Capote signed the forms in blank (173) and Robinson told Capote to give the $750 to Villegas (179). When shown his application at the trial, Capote testified that his form showed that he had sailed on the USNS Taurus (182) but that this was not true. He said further, that in June, 1969, he had only sailed 260-280 hours (182, 213, 260).

Capote paid Villegas the $750 (184, 218) and, in accord with Robinson's instructions, returned the next week and the week after. On the second return, he received a receipt for $150 (186). He received his book sometime later in Seattle (194). In 1970, the FBI requested he return his book (196).

Also testifying against Villegas was John Ragsdale (253). Ragsdale testified that he had come with Capote and John Reilly in May, 1969, from Seattle to obtain Group 1 books (257-8) and that he had met Villegas at the union building (255). The next day, they again met Villegas who asked if they had the necessary funds. They then followed

Villegas to meet Robinson (259). Ragsdale gave Villegas $750 for the book (260, 293) and Villegas introduced him to Robinson. He showed Robinson his discharges, and signed two blank Group 1 application forms (261-2). At trial he was shown the green form he signed and testified that although it stated that he had sailed on the USNS Gordon and USNS Walker, he had never done so (265). The white form correctly listed the commercial ships on which Ragsdale had sailed (266). Ragsdale knew he did not qualify for Group 1 membership (267).

Ragsdale returned to the union building three times for his book, but it was not ready. On the third occasion. Robinson issued a receipt for $150 (271) which Ragsdale used to register as a Group 1 member (272). He received his book on August 25, 1969 (273).

In March, 1970, Ragsdale was notified by the NMU that his book had irregularities (282).

Other witnesses testified to similar transactions with Robinson and Antonio, making no mention of Villegas.

All the green applications, listing MSTS hours worked, were signed by the same employee at the Government Office where the applications were verified.

At the end of the Government's case, counsel for the defense made motions to dismiss the indictment asserting

that the actions testified to did not constitute a crime under 29 U.S.C. §501(c) (534). Counsel argued that there could be no conversion of applications as was meant by the statute. The motion was denied with leave to renew at the end of the trial (539).

Robinson and Antonio both testified and denied taking funds or making any false entries on application forms. Villegas did not testify.

At the end of the trial, all defense counsel renewed their motions to dismiss for failure to state a crime under the statute (See Record on Appeal Documents Number 11, 17, 21). On November 7, 1974, Judge Bonsal denied the motions stating:

> . . . I have considered the memoranda on these motions and I am going to deny them. It's true this is a little different than the usual run of these cases, but on the other hand I think the evidence brought out there was a conversion of the union forms for the purpose of obtaining unlawful payments from seamen to enable them to obtain Group 1 cards. So I am going to deny these motions and I am filing today a brief memorandum of my reasons so that they will be available to the defendants in the event of an appeal.
>
> Minutes of November 7, 1974 at 925.

The Judge also prepared a written opinion, which reads in relevant part:*

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* The full opinion is annexed as D to appellants' joint appendix.

. . . One of the purposes of the Labor-Management Reporting and Disclosure Act of 1959 is to preserve "the highest standards of responsibility and ethical conduct." 29 U.S.C. §401(a), United States v. Silverman, 430 F.2d 106, 114 (2d Cir. 1970, cert. denied, 402 U.S. 953 (1971), rehearing denied, 403 U.S. 924 (1971). To this end, Congress in section 501 defined "in the broadest terms possible the duty which the new federal law imposes upon a union official." United States v. Silverman, supra, at 113 citing Highway Truck Drivers and Helpers Local 107 v. Cohen, 182 F. Supp. 608, 617 (E.D. Pa.), aff'd per curiam, 284 F. 2d 162 (3d Cir. 1960), cert. denied, 365 U.S. 833 (1961).

As pointed out by the defendants, the most frequent violations of section 501(c) have involved union finds. However, in drafting section 501(c), Congress did not invent new language. See United States v. Silverman, supra, at 126. Applicable to section 501(c), therefore, is the Supreme Court's analysis in Morissette v. United States, 342 U.S. 246, 271 (1952) of another provision of federal law employing similar language. . . .

In the present case, there was ample evidence introduced at trial for the jury to find that the defendants misused, or aided and abetted the misuse of union property for personal gain through the use of union Group 1 application forms to sell Group 1 classifications to unqualified seamen. Taking into account the remedial purposes of the Labor-Management Reporting and Disclosure Act and the Supreme Court's definition of conversion in Morrissette v. United States, supra, the Court finds that the use of the union Group 1 application forms to sell Group 1 classifications to unqualified seamen constitutes

"conversion" of those forms within the meaning of section 501(c). Defendants' motions to set aside the verdict and to dismiss the indictment are therefore denied.

(Memorandum, Bonsal, D. J., at 4 and 5.)

ARGUMENT

THE ACTIVITIES CHARGED IN THIS INDICTMENT ARE NOT PUNISHABLE UNDER §501(c).

The District Court believed that the fiduciary obligations imposed upon union employees in section 501(a) of the Labor-Management Reporting and Disclosure Act rendered the activities of appellant Villegas subject to proseuction under section 501 (c). However, an examination of the legislative history of section 501 establishes that Congress did not intend the criminal penalties of §501(c) to cover all facets of the fiduciary responsibility of subsection (a) and that the conduct alleged here is not covered by §501(c). To start with a summary, the history shows that embezzlement of funds and property was part of the Senate bill, that the bill also created a fiduciary responsibility of approximately the same dimensions as the criminal provisions, and that both were limited to "funds and assets." The House of Representatives bill broadened the fiduciary responsibility to include misuse of union position for personal gain. However, the criminal embezzlement statute was not expanded. The statute as finally enacted adopted the broad fiduciary duty and the limited criminal embezzlement provisions. Since the statute also includes sanctions for bribery, failure to keep accurate records, and conflicts of interests, these provisions are the ones applicable here.

A. The Senate

On January 20, 1959, the Kennedy-Ervin bill (S.505) was introduced in the Senate* in an attempt to provide the reforms shown to have been needed by the Senate Select Committee on Improper Activities in the Labor-Management Field (McClellan Committee).** 105 Cong.Rec. (Part 1) 883-884 (January 20, 1959).

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*The Kennedy-Ervin bill derived primarily from the Kennedy-Ives bill that had been introduced in the Senate the prior year and passed by that body in June 1958. Section 109(a) of that bill was identical to section 109(a) of the Kennedy-Ervin bill. The Kennedy-Ives bill was criticized because it contained no provision creating fiduciary responsibility (e.g., 104 Cong. Rec. 11482 (June 17, 1958)).

**After one year of hearings, on March 24, 1958, the McClellan Committee issued its first interim report. In relevant part, the report found widespread misuse of union funds. Financial safeguards were lacking, audits were fraudulent, financial reports to members were false, officials dealt in cash, and vouchers were not submitted or were false, blank-signed checks were

That bill contained in its section 109(a) language virtually identical to the present section 501(c).* Section 109(b) of the bill provided for a civil remedy by the union against anyone convicted under §109(a). The bill (§110(a)) also provided an amendment to Title 18 making it a crime to place a false entry on a labor union record with intent to injure, defraud, or mislead the union. Senator Kennedy, when introducing the bill, listed the basic sections, including criminal sanctions for embezzlement of union funds and false reporting or entries, and suits by union members for recovery of embezzled or misappropriated funds. Ibid.

On January 28, 1959, Senator Goldwater introduced the administration bill (S.748). The bill created a fiduciary duty of officers, agents, and other representatives of a union with respect to union money and property, and was an attempt to fill the gap left open in the Kennedy bill. 105 Cong.Rec. (Part 1) 1273 (January 28, 1959). It contained an identical criminal provision against embezzlement (§412(a)(1)); like the Kennedy bill provision, it was described as a criminal penalty for embezzlement of funds. 105 Cong.Rec. (Part I) 1287 (January 28, 1959).

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given out to union officers, records were destroyed, and unauthorized and improper loans were made. Misuse of union funds totaled over $10 million in union dues money. Proposed recommendations included regulation and control of union funds, including pension, health, and welfare funds.

*The one difference is that §501(c) refers to "union," and §109(a) refers to an organization exempt under §501(a) of the Internal Revenue Act.

Then S.1137 was introduced by Senator McClellan. He included a provision to create fiduciary duties with respect to administration, disbursement, and reporting of funds by union officials (§301). 105 Cong.Rec. 2668 (February 19, 1959).

On April 15, 1959, the Senate bill as modified and amended was introduced as S.1555. The bill did not contain any provision containing fiduciary duties, referring only to a policy of trust, and contained the same criminal provisions for embezzlement of funds (§109(a)). There was no provision for criminal sanction for misstatements in internal union records, although it was a crime to falsify records required by statute to be kepy by the union (see §108). Senate Report No. 187 on S. 1555 states the principal areas covered by the bill:

> Labor organizations are creations of their members; union funds belong to the members and should be expended only in furtherance of their common interest. A union treasury should not be managed as the private property of union officers, however well intentioned, but as a fund governed by fiduciary standards appropriate to this type of organization. The members who are the real owners of the money and property of the organization are entitled to a full accounting of all transactions involving their property.
>
> The financial conduct of labor unions and their officers is a proper concern of the Federal Government. This is so because the funds that pass through union treasuries and for which unions and their officers are responsible are very large, and the uses to which these funds are put have a substantial impact on the Nation's economy. Furthermore, if unions are to enjoy the protection of rights such as are guaranteed to them by the National Labor Relations Act and the Railway Labor Act, they ought also to be held responsible for abuses that have

> accompanied the exercise of these rights by some union leaders.
>
> Similarly, the rules governing the conduct of the union's business, such as dues and assessments payable by members, membership rights, disciplinary procedures, election of officers, provisions governing the calling of regular and special meetings -- all should be known to the members. Without such information freely available it is impossible that labor organizations can be truly responsive to the members which they serve.
>
> Id., at 8.

On racketeering, corruption, and conflicts of interests, the Report states:

> Racketeering, crime, and corruption must be stamped out in the labor and management field as elsewhere. The committee bill carries strong measures for driving criminals from labor unions. Its provisions will also bring to light possible conflicts of interest and similar shadowy transactions through which unscrupulous union officials and employees sacrifice the welfare of employees to personal advantage.
>
> Section 109 would create a new Federal crime of embezzlement of any funds of a labor organization. Conviction would carry a fine up to $10,000 and 5 years' imprisonment.
>
> Section 108 of the committee bill makes it a crime to willfully destroy, or make false entries in the books or records of unions, employers, and middlemen subject to the bill.
>
> Id., at 12. Emphasis added.

Thus, the Report clearly distinguishes provisions which protect against conflict of interests and those which impose criminal sanctions for embezzlement of funds. Clearly, the first category more clearly defines the activities alleged here. The

Report goes on to state that conflicts of interests are treated by reporting and disclosure -- rather than by criminal sanctions, like embezzlement (Report, at 15-16).

Criticising S.1555 as ineffectively protecting union members by failing to include a fiduciary obligation, the statute, Senator Goldwater stated, makes embezzlement of funds a crime, something already the law of every State. 105 Cong.Rec. (Part 4) 5495 (April 8, 1959).

The minority of the committee also objected to the failure of S.1555 to include a provision creating a fiduciary duty by a union official with respect to funds and property. Report, at 72.

Thus, both the fiduciary duty that was suggested and the legislative provision that was included were continually referred to in the proceedings as provisions relating to "funds or assets: (e.g., Report, at 104; Goldwater, 105 Cong.Rec. (Part 5) 6461-6462 (April 22, 1959); Morse, 105 Cong.Rec. (Part 5) 6238 (April 17, 1959); Kennedy, 105 Cong.Rec. (Part 5) 7022 (April 29, 1959).

Senator McClellan, who was particularly distressed at the failure to create a fiduciary responsibility, spoke of it as relating to money and funds:

Mr. President, in the course of the long

series of hearings which the select committee conducted, relating to the serious misuse of funds, misappropriation of funds, looting of union treasuries, and so forth, we found in too many instances that corrupt labor officials regard a union treasury as something to be used for their own personal privilege and an opportunity to pilfer union funds almost at will. I do not believe present laws are adequate to deal with such abuses....

* * *

It should be provided as a matter of law that such officers will be acting in a fiduciary capacity. That is true of officers of other institutions who act as trustees or handle money in trust, or are considered fiduciaries by reason of being officers who handle money. But in the bill a declaration of policy is made that it is in the national interest. I simply say it ought to be provided in the bill that such officers have fiduciary responsibility.

* * *

It is absolutely for the protection of union funds [which belong to the members].... the union funds and the trustee funds.

* * *

[The amendment] simply imposes on the officer the responsibility which is imposed on every other officer who handles money transactions [that it makes him realize that the money belongs to others and that he is handling it in trust....] In the select committee we found many instances of violations of that trust. Probably the most flagrant instance was the Beck situation. Instead of assuming his responsibility and the obligation to handle union money as if it belonged to the union, he simply handled it for his own personal profit and gain. In other words, he pilfered nearly $400,000 of union funds, as we discovered.

105 Cong.Rec. (Part 5) 6523 (April 23, 1959).

The Senators struggled with a definition of the fiduciary duty. Senator Ervin wanted to know if it meant something more than keeping money or property safe. Senator McClellan said no. Senator Ervin stated:

> When the Kennedy-Ives bill was before the Senate last year, an amendment was offered concerning the undertaking to impose a fiduciary obligation without defining what was the fiduciary obligation. As I construe the amendment, the Senator [McClellan] is undertaking to define what is the nature of the fiduciary obligation by saying that the custodian of the property or the money of a union occupies the post of a trustee with respect to such money, and, if I correctly construe the language, the purpose is to make that person responsible for the safekeeping of the money and for the devotion of the money to whatever purposes may have been authorized by the union.
>
> 105 Cong.Rec. (Part 5) 6525 (April 23, 1959).

Senator McClellan agreed with Senator Kennedy's phrasing that it was

> ... the purpose of the amendment to insist that a union officers who expend money shall not have a conflict of interest, and that they shall not attempt, through indirect means, to pilfer a union treasury for their own benefit...
>
> 105 Cong.Rec. (Part 5) 6526 (April 23, 1959).

Again, Senator Kennedy stated:

> ... As I understand the provision in his [Senator McClellan's] amendment, it refers not to the membership voting to do that which is legitimate so far as union business is concerned, but, rather, to prevent the membership from voting at a meeting, with only a few of the Members present, to

> give excessive payments to a union officer for illegitimate purposes. It is to prevent the misuse of union funds by a majority at a meeting when that majority represents only a very small minority of the membership, and to prevent action which could perhaps involve the enrichment of certain union officers by a surreptitious deal.
>
> Mr. McClellan: That is, generally, the object of the amendment. I cannot think of every purpose, and I do not know that anyone else can.
>
> 105 Cong.Rec. (Part 5) 6527 (April 23, 1959).*

Finally included in S.1555 was a fiduciary section (§610) which read:

> Every officer, agent, or other representative of a labor organization engaged in an industry affecting commerce, or of a trust in which such organization is interested, shall, with respect to any money or other property in his custody by virtue of his position as such officer, agent, or representative, have a relationship of trust to any such labor organization and the members thereof, or to any such trust and the beneficiaries thereof, and shall be responsibile in a fiduciary capacity for such money or other property, notwithstanding any exculpatory clause or

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*Senator Javits, concerned with providing a remedy for breach of any fiduciary duty included in the statute introduced §109(b). The section provided a civil suit "when any officer or employee of any labor organization is alleged to have embezzled, stolen, or unlawfully and willfully abstracted or converted to him own use or the use of another any money or property of the labor organization . . ." Senator Javits read this as a remedy for breach of a duty concerning money, and also for a conflict of interests and bribery. Others, however, including the members of the House of Representatives (see infra) did not agree that the language covered these last two categories. See also remarks of Senator Goldwater, 105 Cong. Rec. (Part 8) 10103 (June 8, 1959). This must mean that the identical language in the criminal provision was not meant by Congress to cover conflict of interest and bribery, and the word "property" was not meant by anyone to cover the forms involved here.

> action purporting to exempt him from such responsibility.

As § 1555 was passed, it created a fiduciary duty as to money and property (§610) and included a civil remedy for breach of the trust by embezzlement, theft, or conversion of money and property (§209(b)) and contained the original criminal provision (§209(c)). Thus, the trust relationship and the criminal sanctions related to money and property, which had previously been said to mean "assets." Conflict of interests situations and outright bribery were handled in other criminal provisions. Conflicts were to be revealed by reporting provisions (§202(a)), and are made specific crimes. Bribery was made a crime by §302(b):

> It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment or delivery of any money or other think of value prohibited by subsection (a) with intent to influence him in respect to any of his actions, decision, or duties as a representative of employees or an such officer or employee of such labor organization.

In summarizing the statute, Senator Kennedy referred to criminal sanctions for embezzlement of funds and false representation, and a civil suit for recovery of funds embezzled or misappropriated. 105 Cong. Rec. (Part 5) 7022 (April 29, 1959).

B. HOUSE OF REPRESENTATIVES

In the House, H.R. 4473 created a fiduciary duty (§201(a)) on the part of a representative of a labor organization with respect to money or other property. This was included by Mr. Barden, who was shocked by McClellan Committee reports of embezzlement of union funds and property. There was also included a provisio

making it a crime to embezzle funds or property and falsifying union records (§215).

A second bill, H.R.7680, included more extensive fiduciary obligations:

> Sec. 201. No officer or agent of a labor organization shall, directly or indirectly --
>
> (1) have or acquire any pecuniary or personal interest which would conflict with his fiduciary obligation to such organization;
>
> (2) engage in any business or financial transaction which conflicts with his fiduciary obligation; or
>
> (3) act in any way which subordinates the interests of such labor organization to his own pecuniary or personal interests.

The Committee (Elliott) bill (H.R.8342) and the Landrum-Griffin Bill (H.R.8400) contained identical provisions for fiduciary duties. 105 Cong.Rec. (Part 11) 14344, 14346 (July 27, 1959). For the first time, the fiduciary duty was expanded:

> Sec. 501(a) [of H.R.8342]. The officers, agents, shop stewards, and other representatives of labor organizations occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expand the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the

interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

Discussing this bill, Mr. Brademas stated:

> [There is an assertion that] a union official is left unaccountable for profits reaped while using his office (not union funds) to his personal advantage.
>
> The facts: This is a complete misinterpretation. Section 501(a) explicitly requires union officials to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. The same section also forbids a union officer "from holding or acquiring any personal interest which conflicts with the interests of the organization." Section 501 (b) authorizes an individual member, when these rules are violated and the union fails to sue, to bring a suit "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization."
>
> Daily Cong.Rec. A6572-3, Appendix, July 29, 1959.

See also comments of Mr. Shelley (105 Cong.Rec. (Part 12) 15023 (August 3, 1959)), and Senator Morse (105 Cong.Rec. (Part 12) 14989-14990 (August 3, 1959)).

The House Report 741 on H.R.8342 states the following:

> Section 501(c) would create a new Federal crime of embezzlement of any funds of a labor organization. Conviction would carry a penalty of a fine up to $10,000 and 5 years imprisonment.
>
> Report, at 9.

Later in the report, the following is stated:

The committee bill also contains provisions dealing with breaches of trust and other questionable transactions, which, although not seriously criminal, nevertheless are incompatible with a strong and honestly run labor movement.

For centuries the law of fiduciaries has forbidden any person in a position of trust subject to such law to hold interests or enter into transactions in which self-interest may conflict with complete loyalty to those whom he serves. Such a person may not deal with himself, or acquire adverse interests, or make any personal profit as a result of his position. The same principle has long geen applied to trustees, to agents, and to bank directors. It should be equally applicable to union officers and employees. The ethical practices code of the American Federation of Labor and Congress of Industrial Organizations states:

> It is too plain for extended discussion that a basic ethical principle in the conduct of union affairs is that no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a worker's representative.

Section 501 of the committee bill provides that the officers, agents, shop stewards, and other representatives of labor organizations occupy positions of trust in relation to such organization and its members as a group.

Report, at 10-11.

Still later, when discussing the fiduciary duty, the Report stated:

> Union officials occupy positions of trust. They hold property of the union and manage its affairs on behalf of the members. It is the duty of union officers just as it is the duty of all similar trustees to put their obliga-

tions to the union and its members ahead of any personal interest.

The committee bill sets forth this principle unequivocally and declares that union officers and agents occupy positions of trust in relationship to labor organizations and their members. It then sets forth their duties in terms which the common law applies to all persons who undertake to act on behalf of others:

> *** to hold its money and property solely for the benefit of the organization and its members and to manage, invest and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

We affirm that the committee bill is broader and stronger than the provisions of S.1555 which relate to fiduciary responsibilities. S.1555 applied the fiduciary principle to union officials only in their handling of "money or other property" (see S.1555, sec. 610), apparently leaving other questions to the common law of the several States. Although the common law covers the matter, we considered it important to write the fiduciary principle explicitly into the Federal labor legislation. Accordingly, the committee bill extends the fiduciary principle to all the activities of union officials and other union agents or representatives.

Report, at 81.

Thus, sections 501(a) and (b) are treated separately from section 501(c). Subsection (c) punishes only one aspect -- embezzlement of funds -- of the breach of fiduciary duty. What became §501(c) always included embezzlement of funds, and was never expanded as the provisions which became §§501(a) and (b) were enlarged. Not only the report, but the legislators as well, simply assumed this distinction. See remarks of Mr. Landrum (105 Cong.Rec. (Part 11) 1436 (July 27, 1959)), and of Mr. Elliot (10t Cong.Rec. (Part 14) 15549-15550 (August 11, 1959)).

The Senate ultimately adopted the House proposals, and a statement of Senator Goldwater summarized the effect of what became the law:

> Section 501(a) provides that union officers, agents, shop stewards, and other representatives occupy positions of trust in relation to the union and its members as a group. It makes it their duty, taking into account the special problems and functions of a labor union, to hold the union's money and property solely for the benefit of the union and its members; to manage, invest, and expend the same in accordance with its constitution, bylaws, and any resolution of the union's governing bodies adopted thereunder; to refrain from dealing with their union as an adverse party or in behalf of an adverse party in any matter connected with their duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of the union; and to account to the union for any profit received by them in whatever capacity in connection with transactions conducted by them or under their direction on behalf of the union....
>
> The Kennedy-Ervin bill (S.505), as introduced, contained no provision of any kind imposing fiduciary status and obligations on

union officials. In committee, minority members protested vigorously against this omission and urged an amendment to impose such status and obligations and for an effective remedy against any breach thereof. This amendment was rejected and instead a statement was included in the policy section of the bill as reported to the Senate -- in other words, in the preamble -- declaring it to be the policy of the United States to encourage the faithful observance by union officials of their fiduciary responsibilities by requiring them to file conflict-of-interest reports -- which the bill required anyway under title II -- and to file reports on all expenditures by them, for community welfare, educational or charitable purposes, loans, and other transactions involving union funds -- which were not required under the bill to be filed by them personally.

This statement in the preamble was a mere pious gesture, having no legal effect, providing no remedy for enforcement, and designed to create the misleading public impression that the bill effectively placed union officials in the status of fiduciaries, a status which the public was demanding.

On the Senate floor, an amendment was adopted, imposing a fiduciary status on union officials with respect to money or property in possession of such official by virtue of his office. No remedy for breach of such obligation was provided, nor did the amendment specifically provide that such officials were under a legal duty to refrain from engaging in conflict-of-interest transactions or holdings. The Landrum-Griffin bill both imposed the fiduciary status and provided a remedy for breach thereof. The conference report provided such remedy -- as described below -- and made it clear that involvement of a union official in a conflict-of-interest situation was a breach of his fiduciary responsibility.

Section 501(b) provides that when any such union official is alleged to have violated his fiduciary duties, and the union ... fail[s] to sue or recover damages ..., any member of the union ... may sue the official

> in a Federal district court or a State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief -- including injunctive relief -- for the benefit of the union....
>
> * * *
>
> As indicated above, at no stage of the Senate bill was a remedy for breach of fiduciary duty provided. It is in both the Landrum-Griffin bill and the conference report.
>
> Section 501(c) provides that any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor union of which he is an officer, or by which he is employed, directly or indirectly, shall be guilty of a felony and fined not more than $10,000 or imprisoned for not more than 5 years or both.
>
> This section makes embezzlement or any unlawful taking of union funds a Federal crime in addition to its already being a crime under all the laws of all the States. In addition, under section 501(b), described above, a union member may bring suit, where such an unlawful taking is engaged in by a union official, for breach of the fiduciary duty of such official.
>
> 105 Cong.Rec. (Part 15) 19765 (September 14, 1959).

The statute also includes as §505 an amendment to §302(b) of the 1947 Labor-Management Relations Act the provision against bribery included in the House bill and quoted above.

Thus, the history shows the behavior condemned here was indeed included as part of fiduciary obligation, as Judge Bonsal found, but is not punishable under the conversion and embezzlement provisions. The Government erred in choosing to

prosecute under this section of the statute.

CONCLUSION

For the foregoing reasons, the judgment below must be reversed and the indictment dismissed.*

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*Appellant Villegas also adopts the arguments of appellants Robinson and Alvarez.

Certificate of Serivce

January 13, 1975

I certify that a copy of this brief has been mailed to each of the following:

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The joint appendix for all three appellants was filed and served on January 6, 1975.

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